



EARTHJUSTICE

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ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 2, 2003

Via Facsimile, Followed by U.S. Mail

Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

J. Michael Klise
Thomas R. Lundquist
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

Re: *Washington Toxics Coalition v. Environmental Protection Agency*
Case No. 01-0132C

Dear Wayne and Michael:

We are writing to start the process of negotiating a form of injunction in response to the Court's minute entry in the above-captioned case. Given the short amount of time to produce an agreed-upon injunction, we would like to reach an agreement on the less controversial matters and on a process for resolving the more controversial matters by the end of this week. If we cannot reach agreements on these matters, it may be necessary to ask the Court to appoint a mediator to assist in the process.

On the less controversial matters, we have drafted a form of injunction embodying the Court's July 16, 2003 and August 8, 2003 orders, plus the specific direction given in the August 14, 2003 oral argument. This draft proposed order:

1. Imposes the two-tier buffer zone as a default for the pesticides remaining in the case, subject to exemptions;
2. Lists the covered pesticides;
3. Lists the pesticides excluded because of across-the-board "no effect" determinations;
4. Identifies excluded ESUs for particular pesticides due to "no effect" determinations;
5. Defines salmon streams;

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6. Specifies alternative size buffers for pesticides and ESUs drawn from EPA's recommendations for or reliance on other buffer zones in its effects determinations for particular pesticides in keeping with the Court's August 8, 2003 Order;
7. Provides an exemption for public health purposes as administered by public agencies;
8. Provides an exemption for pesticide application programs that have received a no-jeopardy biological opinion from NMFS for salmon or steelhead pursuant to Section 7 of the ESA;
9. Provides the termination date for the injunction in accordance with the Court's August 8, 2003 Order and page 54 of the transcript;
10. Includes a placeholder for mutually agreed-upon exemptions for crop-and chemical-specific uses of pesticides, according to the parameters set by the court and based on specific justification;
11. Identifies the urban areas covered by additional safeguards beyond the buffer zones;
12. Includes a placeholder for additional safeguards in urban areas for a set of eight pesticides; and
13. Includes an effective date of November 1, 2003 in response to the Court's desire to have it become effective at the end of the current growing season.

In addition to providing a draft proposed order, we will forward under separate cover our proposed additional safeguards for the eight urban pesticides based on Judge Coughenour's statements at the August 14, 2003 argument.

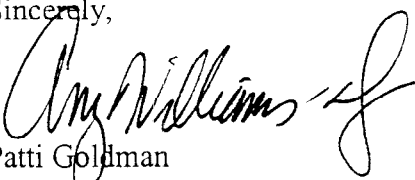
Finally, we would like to propose an orderly process for coming to an agreement with regard to exemptions for crop and chemical specific uses of pesticides per the Court's statements at pages 54-55 of the transcript. The Court provided two guiding principles for such exemptions. First, he has held that the particular buffer zones plaintiffs have requested are effective at reducing runoff. Accordingly, the efficacy of buffers generally or the 20-yard/100-yard buffer zones in particular, are not open to question. Second, he has asked the parties to identify particular uses of particular chemicals on particular crops that either do not produce runoff, and therefore need no buffer, or that produce significantly less runoff and therefore warrant a smaller

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buffer. Because CropLife and EPA have both the interest and the information about such pesticide uses, we believe that CropLife (and EPA to the extent it wishes to make proposals) should initiate any such proposal. For some products, such as bee strips or ear tags, it may be obvious why the use poses little or no runoff problem. However, for others, such as soil incorporation, additional justification will be needed. For example, plaintiffs would want to know whether the pesticide is persistent or binds to soil, in which case it may migrate into surface water even when incorporated into soil. Similarly, we would want to know whether the product is used exclusively in that manner, or whether it is registered or available for purchase for various types of application methods.

While we understand that some registrants may have a desire to seek broader exemptions from the buffer zones, we believe it would be counterproductive to have our discussions focus on pesticide products and uses that do not meet the above guidelines. Given the limited timeline, we believe it is imperative for the parties to agree to a process expeditiously and begin the dialogue. If we cannot agree to a process on our own, we may need to seek the assistance of a court-appointed mediator.

Sincerely,



Patti Goldman
Amy Williams-Derry

Enclosures

cc: J. J. Leary, Jr., counsel for CropLife
Kenneth W. Weinstein, Janice Schneider, counsel for Syngenta
Kimberly M. McCormick, counsel for Syngenta
Cherise M. Gaffney, Laurie Beale, counsel for Central Garden & Pet
Richard S. Gleason, counsel for Central Garden & Pet
Stewart N. Mesher, counsel for Dow Agrosciences/Makhteshim-Agan of North America
David B. Weinberg, counsel for Dow Agrosciences/Makhteshim-Agan of North America
Erika Schreder, Washington Toxics Coalition
Norma Grier, Northwest Coalition for Alternatives to Pesticides (NCAP)
Glen Spain, Pacific Coast Federation of Fishermen's Associations and
Institute for Fisheries Resources

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ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 9, 2003

Via Facsimile, Followed by U.S. Mail

Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

J. Michael Klise
Thomas R. Lundquist
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

Re: *Washington Toxics Coalition v. Environmental Protection Agency*
Case No. 01-0132C

Dear Wayne and Michael:

On September 2, 2003, we sent you a proposed form of injunction and a proposal for an orderly process to reach agreement on issues Judge Coughenour directed the parties to address. We acted expeditiously to initiate the negotiating process given that the Court directed the parties to submit an agreed-upon form of injunction by September 25, 2003. We did not send this proposal prior to September 2, 2003 to accommodate what we understood were pre-arranged vacations for both of you.

On September 5, 2003, I called to follow-up on our September 2, 2003 correspondence. In a three-way call, we agreed to the following schedule:

September 8	The Toxics Coalition would submit an urban proposal
September 9	EPA would submit a counterproposal to the September 2, 2003 Toxics Coalition's proposed form of injunction EPA would coordinate with CropLife on that counterproposal
September 12	The parties would hold a negotiating session on the form of injunction
September 15-16	CropLife would submit its proposal for specific exemptions from the 100/20 yard buffers
September 15-16	EPA would submit its proposal on the placeholder issues (urban restrictions and buffer exemptions), if any
September 18	The parties would hold a negotiating session on the placeholder issues

We also discussed the possibility of scheduling additional negotiating sessions for the week of September 22, 2003.

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In a telephone conversation this afternoon, EPA indicated that it does not have a counterproposal and that it does not know when it will have one to provide to the Toxics Coalition. While Wayne provided some negative reactions to aspects of the Coalition's September 2, 2003 proposal, and objected to various components, he did not provide any concrete proposals from EPA. CropLife has no separate proposal because it was planning to react to and contribute to EPA's proposal.

As we expressed in our September 2, 2003 letter, the parties must all be committed to a uniform schedule of exchanging proposals, and negotiating, if we are to comply with the Court's direction to present a joint order by September 25, 2003. We thought we had agreed to such a structure last Friday. However, EPA is already slipping from this schedule, and has not presented any alternative schedule or strategy. If the parties cannot agree to a firm schedule, and make serious commitments to abide by that schedule, we believe it will be appropriate to ask the Court to appoint a mediator to facilitate this process.

We look forward to working with you productively and cooperatively in drafting the form of injunction. As we indicated in our conversations today, we will call Wayne tomorrow to see whether EPA has any new information.

Sincerely,

A handwritten signature in cursive script that reads "Patti".

Patti Goldman
Amy Williams-Derry

0005

Catherine Hamborg

From: Patti Goldman
Sent: Wednesday, September 10, 2003 3:05 PM
To: 'Wayne Hettenbach (E-mail)'; 'J. Michael Klise (E-mail)'
Cc: Amy Williams-Derry
Subject: Status of negotiations

Wayne & Michael

I am confirming my understanding from today's call. EPA has committed to provide a written counterproposal to our proposed form of injunction. Wayne hopes to have this to us by next Monday or possibly this Friday. While the commitment to provide a written counterproposal is firm, no date is. Wayne will let us know when he has a firm time for transmitting the counterproposal. EPA may include its urban proposal in that transmittal.

Shortly after EPA provides us with a counterproposal, CropLife will send an email either joining that proposal or providing a separate proposal in whole or in part.

CropLife will provide us with its buffer proposal by Monday or Tuesday at the latest. CropLife will provide its urban proposal later next week but will try to accelerate transmittal of that proposal.

We cancelled the September 12 negotiating session since we will not have written counterproposals to discuss. We discussed the idea of having a negotiating session on some issues that do not necessarily depend on particular drafting language, but Wayne believed that would delay transmittal of the written counterproposal. In that light, we did not pursue such discussions.

Patti

Patti Goldman
Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
Ph: (206) 343-7340 ext. 32
Fax: (206) 343-1526
www.earthjustice.org

0006

Catherine Hamborg

From: Klise, J. Michael [jmklise@crowell.com]
Sent: Monday, September 15, 2003 2:37 PM
To: Wayne.Hettenbach@usdoj.gov; Patti Goldman
Subject: RE: Washington Toxics v. EPA -- Injunction Language

And, to respond to Patti's message to me earlier this afternoon, I expect to have information on buffers to provide to you in an e-mail by COB tomorrow. On urban-use, I am checking with my client to see where it stands.

Michael

J. Michael Klise
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
Tel. (202) 624-2629
Fax (202) 628-5116
jmklise@crowell.com
www.crowell.com

-----Original Message-----

From: Wayne.Hettenbach@usdoj.gov [mailto:Wayne.Hettenbach@usdoj.gov]
Sent: Monday, September 15, 2003 5:25 PM
To: 'pgoldman@earthjustice.org'; Klise, J. Michael
Cc: 'awilliams-derry@earthjustice.org'
Subject: Washington Toxics v. EPA -- Injunction Language

Dear Counsel,

In response to both your calls to me today, I expect to have draft language for the injunction to provide you in the morning tomorrow.

Wayne

Wayne D. Hettenbach, Trial Attorney
U.S. Department of Justice, ENRD
Wildlife and Marine Resources Section
P.O. Box 7369
Washington, DC 20044
t: 202-305-0213 f: 202-305-0275

Patti Goldman

From: Klise, J. Michael [jmklise@crowell.com]
Sent: Tuesday, September 16, 2003 3:28 PM
To: wayne.hettenbach@usdoj.gov; Patti
Cc: Quarles, Steve
Subject: Intervenor's Proposed Buffer Zones

Dear Counsel:

Attached is a draft spreadsheet on intervenors' proposed buffer zones. Since this is a work in progress, I want to be clear what this does (and does not) represent. Going from left to right across the spreadsheet, for each product containing a given active ingredient, the spreadsheet identifies the ingredient; product name; manufacturer; EPA registration number; states in which registered for use; application method; crops for which it is registered; any water-related label restrictions; and whether the product is registered for aquatic use. As best we know, the information in those columns of the spreadsheet is complete.

As you will see, the information in the final two columns -- headed "Proposed Buffers" and "Reasoning" -- is not yet complete. Although the spreadsheet is arranged alphabetically by active ingredient, our process of gathering information has necessitated contacting many individual companies. It has been, and continues to be, an enormous undertaking. The attached spreadsheet contains information for six companies -- Syngenta, MANA, Cleary, Cerexagri, DuPont and FMC -- covering 14 active ingredients. For other companies, blank cells in the final two columns for a given product do not signify that intervenors will be proposing no buffers or offering no rationale, but rather that we have not yet added that information to the spreadsheet. We are in the process of adding additional company-specific information to those columns on an ongoing basis, and will provide you with one or more updates as that process proceeds.

For some products, you will see that we have used a shorthand reference to the Mahini declaration. In those instances, intervenors plan stand on the information provided to the court in the Mahini Declaration filed in advance of the August 14 hearing.

The spreadsheet is currently formatted for printing on legal-size paper.

If you have any questions prior to our scheduled conference call this Thursday at 3:30 EDT, please let me know.

Michael

J. Michael Klise
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
Tel. (202) 624-2629
Fax (202) 628-5116
jmklise@crowell.com
www.crowell.com

<<IntervPropBuffersCirc091603(v1).XLS>>

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9/16/2003



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ENVIRONMENTAL LAW CLINIC AT UNIVERSITY OF DENVER
ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

September 18, 2003

Via Facsimile, Followed by U.S. Mail

J. Michael Klise
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

Re: *Washington Toxics Coalition v. EPA*
Case No. C01-0132C

Dear Michael:

I am writing to provide an initial response to CropLife's proposed buffer zones and to propose a more productive approach to negotiating this issue.

As a preliminary matter, we note that CropLife's proposal is incredibly sparse. While the spreadsheet has entries for a total of 334 different registered pesticide products, there are buffer proposals for only 32 of those pesticides. Your email clarification of today indicates that the proposal is a work in progress and that additional buffer proposals will be made for a large portion of the remaining pesticides and that six active ingredients were inadvertently omitted from the spreadsheet. Proposed buffers will be forthcoming for these pesticides as well.

It has been five weeks since the August 14, 2003 oral argument and the Court's direction that the parties negotiate a form of injunction. The delay in making initial proposals may make it impossible to reach agreement on exemptions from the standard 20-yard ground and 100-yard aerial buffers that the Court will otherwise impose.

Even as to the proposed buffers, CropLife has generally not adhered to the standards established by the Court's rulings or the request for justification that we made in our letter of September 2, 2003. To facilitate an efficient and productive negotiation process, we will restate the type of information that we will need to be able to come to agreement on specific alternative buffer zones.

First, in the Court's July 16, and August 8, 2003 Orders, the Court found that the particular buffer zones plaintiffs have requested are effective at reducing runoff. The Court also indicated that it would not hold a full-blown evidentiary hearing and that it is inappropriate for the plaintiffs or the Court to determine the precise effects of EPA-registered pesticides on listed

J. Michael Klise
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salmonids. August 8, 2003 Order at 19. We do not believe the Court intended to invite CropLife to argue for different size buffers based on its view as to the efficacy of smaller buffers.

Second, the Court's August 8, 2003 Order identified the type of expert recommendations that would be used to craft interim injunctive relief. Specifically, the Court pointed to the specific buffer recommendations made by EPA in its effects determinations prepared pursuant to the Court's July 2002 order. August 8, 2003 Order at 13. In allowing EPA and CropLife to argue for buffers of particular sizes for particular pesticide uses in particular ESUs, the Court clarified:

Where an EPA expert has already recommended specific buffer zones or relied upon existing voluntary buffer zones in the course of section 7(a)(2) consultation – such as Dr. Turner with respect to propargite – the Court shall likely adopt those buffer zones as appropriate interim injunctive relief. Absent an EPA “no effect” determination or stipulation from plaintiffs, the Court shall not entertain arguments that *no* buffer zones are appropriate.

Id. at 20. To assist in crafting such an injunction on this basis, the Court requested that “plaintiffs submit at oral argument a chart outlining, on a per pesticide active ingredient and per ESU basis, any specific buffer zones recommended by Dr. Turner or other EPA expert, including existing buffer zones or state programs on which EPA effects determinations may rely.” Id. at 22 n.37.¹ In contrast, the Court rejected buffer zones prescribed in EPA-approved labels and registration decisions because those “buffer zones were set without any particular reference to threatened and endangered salmonids and the institutionalized caution mandate of the ESA.” Id. at 14 n.21; see also id. at 17 & nn.26-27.

CropLife's proposal for alternative buffer zones relies principally on registration documents, existing labels, and registrant arguments and analyses. It is our position that alternative buffer zones to mitigate for runoff and spray drift should be different than the 20-yard ground and 100-yard aerial buffers only where there is a basis in the form of an agency expert opinion rendered in the course of Section 7(a)(2) compliance. Therefore, to expedite our negotiation process, we ask that CropLife limit its proposals for alternative runoff and spray drift proposals to those that are supported in this fashion.

Third, at oral argument, the Court indicated that it would consider different buffer zones for specific pesticide products, application methods, crops, and ESUs on a case-by-case basis where the particular use and circumstances make runoff less of a problem. The Court offered the

¹ On August 12, 2003, in response to this request, the Toxics Coalition filed a summary of EPA expert buffer recommendations for specific pesticides and ESUs. Neither EPA nor CropLife has disputed this summary or identified different recommendations in EPA's effects determinations.

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following example: "for example, the suggestion as to one of the chemicals that it's directly injected into the soil so that isn't as much of a runoff problem." Transcript at 54. In keeping with this direction, we ask that CropLife limit its proposed buffer zones to those situations where runoff concerns are lessened because of: (1) the specific use, e.g. indoor use; (2) the product device, e.g., ear tags or bee strips; or (3) a specific application method, e.g., soil injection, painting, or wicking, coupled with the pesticide characteristics and use. Buried within EPA's filings in the litigation and the fine print in the spreadsheet are some indications that a pesticide may be used in a manner that produces less runoff. However, CropLife's proposal generally is focused on wholesale exemptions based on arguments in favor of different buffer dimensions. The proposal does not lend itself to a productive dialogue on the only issues that we believe are appropriate for negotiation.

Since time is limited, focusing the proposals and negotiations as laid out above is imperative if we are to satisfy the Court's directive that we negotiate a form of injunction by September 25, 2003.

Sincerely,

A handwritten signature in black ink, appearing to read "Patti Goldman".

Patti Goldman
Amy Williams-Derry

cc: Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

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EARTHJUSTICE

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September 22, 2003

Via Facsimile, Followed by U.S. Mail

Wayne D. Hettenbach
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369

Re: *Washington Toxics Coalition v. Environmental Protection Agency*
Case No. 01-0132C

Dear Wayne:

I am writing to respond to and correct some mischaracterizations in your letter dated and sent by facsimile earlier today.

First, in Thursday's call, we did not state that we would be unwilling to jointly seek an extension of time for submitting the joint proposed order to the Court. We scheduled today's call to address that issue in light of further developments. As we indicated on Thursday, we want to receive an urban proposal from EPA and/or CropLife in order to see the extent to which the parties' positions coalesce or differ. Without any proposal from the defendants or defendant-intervenors, we are unable to ascertain how fruitful negotiations on that issue will be. We had hoped that we might have such a proposal in hand today, which would allow us to identify an appropriate amount of additional time for negotiations. We also want to discuss an orderly way to proceed on alternative buffer proposals. We transmitted a letter to CropLife on Thursday laying out our position in that regard. We would like to discuss that matter today as well.

Second, on Thursday's call, EPA and CropLife sought an additional two weeks for negotiations without any commitment to provide an urban proposal by a date certain and without a structure for productive negotiations in place. We are pleased that the proposed extension is now a one-week extension and that it is accompanied by some concrete suggestions for structuring the negotiations over that time frame. We will be happy to discuss the one-week extension and the proposed structure for negotiations on our call today. We will also again be asking for a certain time for our receipt of an urban proposal from EPA and CropLife and for establishment of a more productive negotiation process on alternative buffers.

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Wayne D. Hettenbach
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Third, to clarify, to date, we have received only one written counterproposal from EPA for the framework of the injunction and only a partial buffer proposal from CropLife. In the one negotiating session we have had since receiving EPA's counterproposal, we believed the parties came closer to agreeing on the structure and many of the terms and provisions in the injunction. While some differences exist, we are more optimistic than your letter suggests that the parties will be able to submit a joint proposed order with separate proposed orders covering their areas of disagreement. Because of that optimism and the Court's direction, we believe that the parties should jointly submit a proposed order to the maximum extent possible with separate supplemental proposals covering points of disagreement.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patti".

Patti Goldman

cc: J. Michael Klise
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595



September 23, 2003

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SEP 26 2003

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J. Michael Klise
202 624-2629
jmkklise@crowell.com

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BY E-MAIL, FOLLOWED BY FIRST CLASS MAIL

Patti Goldman
Amy Williams-Derry
Earthjustice Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104-1711

Re: *Washington Toxics Coalition v. EPA*, No. C01-0132C (W.D. Wash.)

Dear Patti and Amy:

I am writing to respond to certain points raised in your letter dated September 18, 2003, in which you provide plaintiffs' initial response to CropLife's proposed buffer zones.

As I've explained in earlier e-mails and in our conference calls, we are continuing to add information to the spreadsheets and provide you with revised versions at points when it is practicable to do so. We expect to have another version to you by COB this Thursday. In the meantime, as I mentioned yesterday, you can be guided by the information in Mahini Declaration Exhibit 1, since the spreadsheet is generally a more fine-grained presentation of the information presented there. If the spreadsheet's information seems "sparse," it is primarily because of the large number of pesticide *products* involved. We are striving to gather and provide you with that degree of detail in response to your desire for complete information on ingredient uses.

I recognize that the Court's August 8, 2003 Order identified a type of expert recommendation that could be used for the court to craft interim injunctive relief. But, at that point, the Court had not seen the ingredient-specific proposals that were reflected in the Mahini Declaration and amicus briefs filed in conjunction with the August 14 hearing. Furthermore, at the hearing, Judge Coughenour was not so limited as his August 8 order might have suggested. Rather, he counseled:

I would like you to give careful consideration to the suggestions in Mr. Klise's submittal, the Mahini affidavit, regarding specific crop and chemical limitations. Like, for example, the suggestion as to one of the chemicals that it's directly injected into the soil so that isn't as much of a runoff problem. If it's applied in that manner, the buffer ought to be different or maybe not even apply at all.

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Patti Goldman
Amy Williams-Derry
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Given the Court's instructions, CropLife will not, as you request, limit intervenors' proposal for alternative runoff and spray drift buffers to those that can be supported "in the form of an agency expert opinion rendered in the course of Section 7(a)(2) compliance." Whatever the ultimate standard once consultation occurs, it should not in our view control for interim relief pending consultation. As to specific uses, intervenors cannot limit their proposals to those you identify in the penultimate paragraph of your letter. Those may be the only types of uses on which plaintiffs are willing to engage in dialogue, but that limitation won't control the scope of alternative buffers intervenors present to the court in as part of a proposed form of injunction.

I look forward to discussing this with you later this week.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Klise".

J. Michael Klise

Cc (by e-mail): Wayne D. Hettenbach